IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 79.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

versus

COCA-COLA BOTTLING CO. of LOUISVILLE, INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the petition of the Solicitor General on behalf of the National Labor Relations Board that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 15, 1955, which remanded the case to the Board with instructions to conduct further proceedings, be denied.

The Respondent accepts, pursuant to Rule 40(3) of United States Supreme Court, the presentment in Petitioners' Brief of Orders and Opinions below; Jurisdiction; and Statement of the Case.

STATUTE AND RULE INVOLVED.

The text of Section 9(h) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 159(h), which is set out in Petitioner's brief (p. 2), has been amended by P. L. 189, 82d Cong., 1st Sess., 65 Stat. 601. Section 9(h), as so amended, is set forth below. The amendment deletes the language which is enclosed in brackets:

> No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, [no petition under Section 9(c)(1) shall be entertained,] and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Gov-

crimment by force or by any illegal or unconstitutional methods. The provisions of Section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Section 102.13(b) of the Board's Rules and Regulations, also included here, is set out in Appendix B *infra* (p. 23).

QUESTIONS PRESENTED.

1. Whether the Respondent Employer may challenge in an unfair labor practice proceeding the determination of the National Labor Relations Board that a union is in compliance with Section 9(h) of the National Labor Relations Act when that determination is based on an alleged erroneous construction of the statute.

2. Whether the application in this case of the Board's "constitutional" test for determining who are officers required to file non-Communist affidavits under Section 9(h) of the National Labor Relations Act is erroneous.

Respondent contends both these questions should be answered in the affirmative.

ARGUMENT

The issue which is before the Court on this petition for a writ of certiorari arises from an unfair labor practice proceeding in the course of which respondent questioned the Union's compliance with the non-Communist affidavit requirement of Section 9(h) of the National Labor Relations Act. This section provides, among other things, that no complaint shall be issued pursuant to a charge of unfair labor practice unless each officer of the labor organization seeking to invoke the machinery of the Act, and each officer of any national or international labor organization with which it is affiliated shall have filed with the Board an affidavit stating that he is not a member of the Communist Party or supports any organization that believes in or teaches the overthrow of the Government by force or illegal methods.

The record discloses that one W. B. Taylor, Regional Director in Kentucky of the Congress of Industrial Organizations with which the charging Union in this case is affiliated, failed and refused to file a non-Communist affidavit pursuant to Section 9(h) of the Act. It is the contention of Respondent that this fact placed the Union in non-compliance with the Act and that this issue may properly be raised by the company in an unfair labor practice proceeding.

In hearings before the Trial Examiner the Respondent offered to show that Mr. Taylor occupied so important a position of responsibility and authority in the affairs of the C. I. O. that he was able to exercise

decisive influence on the C. I. O. unions operating in Kentucky and in labor relations there. Respondent's view was that one holding such an important executive post must be considered to be an "officer" of the C. I. O. within the meaning of the filing requirements of Section 9(h) of the National Labor Relations Act, and therefore must file a non-Communist affidavit regardless of the fact that the particular position held by Taylor was not listed as an office in the C. I. O. constitution, which was the Board's test for requiring the affidavit.

The Trial Examiner rejected the Respondent's offer of proof on the ground that the Board, prior to the hearing, had determined that the Union was in compliance with the Act. Questions of the compliance status of a union, the Trial Examiner said, were for the administrative determination of the Board and were not litigable by the parties in an unfair labor practice proceeding (R. 516a, 517a). Thereafter, the Board affirmed the Trial Examiner's ruling for the reasons which he had set forth (R. 528a, 529a).

The Board reached its administrative determination that the Union was in compliance, even though Regional Director Taylor had not filed the non-Communist affidavit, by application of Section 102.13(b) (3) of the Board's Rules and Regulations which defines "officer" as follows: "The term 'officer' . . . shall mean any person occupying a position identified as an office in the constitution of the labor organization. . . ." Under this so-called "constitutional" test Mr.

[1] The full text of Section 102.13(b) is set out in Appendix B to this brief.

Taylor was not classified as an officer because his executive post was not denominated an "office" in the C. I. O. constitution.

Respondent here asserts, and the Court below has held, (a) the Board's interpretation of the meaning of the term "officers" in Section 9(h) of the Act is subject to judicial review, and (b) the Board's "constitutional" test for defining "officers" is inconsistent with the intent of Congress in enacting Section 9(h).

The Decision of This Court in *N. L. R. B. v. Highland Park Manufacturing Company* Establishes the Right of the Respondent to Challenge in an Unfair Labor Practice Proceeding the Determination of the Board That a Union Is in Compliance With the Statute When That Determination Is Based on an Alleged Erroneous Construction of the Statute.

The right of the employer to challenge the compliance of the charging union when the question of compliance involves an issue of the construction of Section 9(h) of the National Labor Relations Act has

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"Respondent's objection to the Board's determination of compliance thus only goes to the "constitutional" test which was the sole basis for that determination. Respondent does not urge that the Board may not bind the parties to an unfair labor practice proceeding by its determination of factual issues in regard to the compliance status of unions. It would be a different case if the Board had adopted a finding such as the following: "Upon prior investigation of the duties and functions exercised by Regional Director Taylor, we have concluded that in fact his influence in union affairs and labor relations is too insignificant and unimportant for him to be considered an officer within the meaning of Section 9(h)." But in effect the Board here has said: "Under our "constitutional" test, Mr. Taylor is not, as a matter of law, to be considered an officer because his position is not denominated an office in the C. I. O. constitution, regardless of what control he exercises over the C. I. O. affiliates and in labor management relations."

been established authoritatively by this Court in *N. L. R. B. v. Highland Park Manufacturing Co.*, 341 U. S. 322 (1951). In that case the Textile Workers Union charged the employer with an unfair labor practice; and in the proceeding thereby initiated, it developed that officers of the C. I. O., with which the charging union was affiliated, had not filed the non-Communist affidavits. The employer, in raising the compliance issue, relied on the language of the Act which provided that no complaint could be issued by the Board pursuant to a charge made by a labor organization unless there were on file with the Board non-Communist affidavits executed by each officer of any national or international labor organization of which the charging union was an affiliate or constituent unit.

The Board had held that the C. I. O. was not a "national or international labor organization" as the words were used in the Act, and hence that the C. I. O. officers were not required to file affidavits before the Board could issue the complaint. Thus the question in the *Highland Park* case was the definition of "national or international labor organization" and the Board's determination of compliance with the statute based on its definition of that phrase. In this case, the question is the definition of "officers" in Section 9(h) and the Board's determination of compliance founded upon its interpretation of the term "officers."

The Board also argued in the *Highland Park* case, as it does here, that its administrative determination that the union was in compliance (which determination was based on the Board's view of the proper construc-

tion of Section 9(h)) was not subject to challenge by the employer in an unfair labor practice proceeding.

This Court held that the Board had wrongly interpreted the statute and that the employer was correct in maintaining that the C. I. O. was a "national or international" union whose officers must file affidavits. It also specifically rejected the Board's contention that its administrative determination of compliance could not be contested. The opinion held that when the Board's determination of compliance involved an issue of law, as distinguished from questions of fact, the employer was not precluded from challenging in an unfair labor practice proceeding the compliance status of the union. Mr. Justice Jackson stated:

> "We think the [Board's] contention [that its administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding] is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U. S. at 325, 326.

We respectfully submit that the instant case is indistinguishable from the *Highland Park* decision in the respect that both cases present the same issue of whether the employer may challenge the Board's determination that the union was in compliance on a point of law, namely, the construction of Section 9(h)

applied by the Board in making that determination. In neither case did any dispute over the facts arise. It was not denied in the *Highland Park* decision that the C. I. O. Officers had not filed affidavits; nor here that Regional Director Taylor had not filed. In both cases the simple issues relate to (a) whether the statute should be construed so that the persons involved would be brought within the affidavit filing requirement of the Act and (b) whether an employer could question the Board's determination that the statute did not require such persons to file affidavits. The *Highland Park* decision ruled in favor of the employer on both issues and, we submit, its holding must be controlling here.

Since this Court in that case has already given a clear negative answer to the Board's contention that the employer is precluded from questioning the compliance status of a union when the issue is the construction of Section 9(h) upon which the Board's determination of compliance is bottomed, it is submitted that no grounds for granting the writ of certiorari on this basis are available to the petitioner.

The petitioner, in seeking to distinguish the *Highland Park* decision from the case presented here (Petitioner's Brief, p. 12), mistakenly argues that a question of fact is present here and relies on the following language of the *Highland Park* opinion:

> "If there were a dispute as to whether the C. I. O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor

of the labor organizations, a different question would be presented. But here there is no question of fact." 341 U. S. at 325.

But this language does not help the Petitioner. Mr. Justice Jackson here was giving two examples of questions of the "fact of compliance" which he suggested might be held to be a matter for the Board's exclusive determination: (1) a dispute whether affidavits had or had not been filed, or (2) a dispute whether the affidavits on file were sufficient in form and content.

Respondent is unable to see that anything like the problems indicated in these examples is involved here. No one denies that Mr. Taylor had not filed an affidavit. The question is whether the statute makes it necessary for one in his position to file an affidavit. The Respondent does not urge that any of the C. I. O. affidavits which are on file are deficient in form or are otherwise unsatisfactory, but only that Taylor must file an affidavit for there to be compliance.

No Conflict Among the Circuit Courts of Appeals Exists Relating to the Question Here Presented.

The Board in its brief (p. 11) argues that two Circuit Courts of Appeals have decided the question here presented differently than the Court below. But a careful analysis of the two cases cited by Petitioner clearly indicates that neither conflict with the decision of the Court below for the reason that both cases decided only that an employer may not litigate questions of *fact* in regard to the compliance status of the union.

In *N. L. R. B.* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369 (5th Cir. 1954), certiorari denied, 348 U. S. 873, (1954), the Court held that the truthfulness or completeness of the non-Communist affidavits may not be litigated in an unfair labor practice proceeding. Since Respondent did not urge that any of the union affidavits on file were false or insufficient, or any other issue of fact, the problem of the *Vulcan Furniture* case does not here arise.[3]

In *American Rubber Products Corp.* v. *N. L. R. B.*, 214 F. 2d 47 (7th Cir. 1954), the issue was whether one Sheehan, a union representative, who had not filed an affidavit, was an officer or a *de facto* officer of the union. The Court noted that the Board had found upon an independent investigation that Sheehan was not an officer, either *de facto* or otherwise; and the Court held that the employer could not challenge this administrative determination of a *question of fact* in an unfair labor practice proceeding. No issue of the proper definition of "officer" in Section 9(h) was before the Court. The essential difference here is that Respondent does challenge the Board's determination of law that Regional Director Taylor could not be an

[3]The courts clearly distinguish between the right of the employer to object to the Board's detemination of compliance when the challenge raises issues of fact as in the *Vulcan Furniture* case, and the right of the employer to contest the Board's construction of the statute upon which the Board bases its determination of compliance. Judicial treatment of these two distinct problems is essentially different as appears from a comparison of the decision of the Sixth Circuit Court of Appeals in *N. L. R. B.* v. *Louisville Container Corp.*, 209 F. 2d 654 (1954), which raised the same problem as that in the *Vulcan Furniture* case, and that Court's decision in this case. In the *Louisville Container* case the same judges who sat on this case below decided in a *per curiam* opinion that the verity of affidavits was not litigable in unfair labor practice proceedings.

officer required to file an affidavit because his post is not entitled an office in the C. I. O. constitution.[4]

Expedition in the Administration of the Act Is Not Sacrificed by the Rule Contended for by the Respondent.

The Board urges that litigation of the question of the compliance of the union with Section 9(h) in the manner here contended for would seriously impede the resolution of the unfair labor practice charges (Petitioner's brief, pp. 12-15).[5] Actually it does not

[4]The Board also cites (Petitioner's brief, p. 12) the Sixth Circuit's decision in *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645 (1954), with the *Vulcan Furniture* and *American Rubber Products* cases. In the *Sharples Chemicals* case the employer argued that the Board must make a showing on the record as to whether or not the charging union is in compliance before the Board may proceed to resolve the unfair labor practice charge. The court, in rejecting the employer's argument, merely decided that the Board did not have to prove affirmatively in the unfair labor practice proceeding that the union had in fact filed affidavits. Obviously the problem in the *Sharples Chemicals* case is different than the issue in this case of the definition of "officers" which the Board applies in making its determination that a union is in compliance. And the Sixth Circuit has recognized this difference since it decided against the employer in the *Sharples Chemicals* case and for Respondent here.

[5]The Board (Petitioner's brief, p. 13, fn. 5) cites from the legislative history of Section 9(h) certain statements made by Senator Taft while that provision was in the process of passage to support its argument about the need to avoid delay in the hearing of unfair labor practice charges. These remarks of Senator Taft which appear at 93 Cong. Rec. 6444, 6447, 6860 (Legislative History of the Labor Management Relations Act, 1947, pp. 1542, 1547, 1625) are inconclusive so far as the particular problem presented here is concerned. They were directed to explaining a change made in the mechanics of Section 9(h) while the bills which became the Taft-Hartley Act were under the consideration of Congress. In earlier versions of Sections 9(h) it was provided that a union could not be certified as a representative of employees if its officers were Communists. While the anti-Communist provision of the statute stood in this form, it was felt that the question of whether the union officers were Communists would have to be litigated in each case

(Footnote continued on following page)

seem that the Trial Examiner would have appreciably slowed down the determination of this case by allowing the Respondent to present his evidence on the important and influential role which Regional Director Taylor plays in labor affairs in Kentucky. In view of the fact that nearly three years elapsed from the filing of charges to the entry of the Board's order and that the hearing before the Trial Examiner continued for a month, it does seem that a few more hours could have been spared in order to determine Taylor's duties and responsibilities and, therefore, whether the Union had properly qualified itself to ask the Board for relief.

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before the Board. To avoid this delay, the statute as finally enacted was changed so that the officers of the unions would have to file non-Communist affidavits before the Board could proceed to dispose of a labor case. Senator Taft was not expressing a general view as to how litigation in unfair labor practice proceedings was to be conducted. Certainly he did not say that the Board's definition of "officers" upon which the Board made a determination of the compliance of a union with the statute should not be subject to challenge on the part of an employer in unfair labor practice proceedings in order to save time in the administration of the Act.

The Board also points (Petitioner's brief, p. 13, fn. 5) to a portion of the report of the Joint Committee on Labor Management Relations, which was made in the year after the passage of the Taft-Hartley Act. The comments of this Joint Congressional Committee do not, however, touch the precise issue here involved. The report stated:

> "Board hearings must be confined to evidence going into the merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives" (Sen. Rep. No. 986, Part 3, 80th Cong. 2d Sess., p. 45).

That the Committee only had in mind that certain questions of fact in regard to the compliance of the union Section 9(h) should not be litigated in the unfair labor practice proceeding is made clear by another statement immediately preceding the above-quoted sentence on page 45 of the report:

> "If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to its having been filed, the records will be hopelessly overburdened with such proof."

Furthermore, the policy of expediting the administration of the Act must be balanced against the consideration that the statute should be correctly interpreted. Surely Congress did not mean that the Board should frustrate its policy of eliminating Communists from positions of leadership by applying an incorrect definition of "officers" who are required to file affidavits. Yet this anomalous result will occur if the Board is permitted to make a binding determination of compliance upon the basis of an erroneous definition of "officers" without that definition being subject to judicial review. The policy against unnecessary delay may well outweigh the value of litigating issues of fact, previously determined by independent investigation of the Board, in the unfair labor practice proceeding. But where as here a determination of compliance is based upon an erroneous interpretation of the statute, this Court, we submit, has decided in the *Highland Park* decision that the policy of not allowing an incorrect construction of Section 9(h) to be applied in unfair labor practice proceedings prevails over the need to expedite the hearing.[6]

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[6]The Board also cites (Petitioner's brief, p. 13, fn. 5) three cases to support its argument that the question of compliance raised in this case must be left exclusively to the Board's administrative determination in order to prevent delay. *N. L. R. B.* v. *Greensboro Coca-Cola Bottling Co.*, 180 F. 2d 840 (4th Cir. 1950); *N. L. R. B.* v. *Wiltse*, 188 F. 2d 917 (6th Cir. 1951), certiorari denied *sub. nom. Ann Arbor Press, Inc.* v. *N. L. R. B.*, 342 U. S. 859 (1951); *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645 (6th Cir. 1954). These cases merely decide that, in the interest of expediting hearings of unfair labor practice charges, the Board does not have to prove affirmatively in an unfair labor case that the union had in fact filed affidavits before it can validly decide the unfair labor practice charge. These decisions do not hold that the employer may not raise questions of law as to the Board's determination of compliance.

In support of its position that the employer should not be permitted to challenge the compliance of a union in an unfair labor practice proceeding, the Board points out that it will provide a collateral proceeding for determining questions of compliance when parties to unfair labor practice cases show the need for it (Petitioner's brief, pp. 6, 7, 15).

However valuable this practice may be in settling disputes as to issues of fact in regard to the compliance of unions, resort to such a collateral proceeding would have been futile here. The Board clearly indicated that if the Respondent had asked for and had obtained a collateral proceeding and that if the Respondent had proved what it offered to show in the unfair labor practice proceeding regarding Mr. Taylor's position, it would have decided in the collateral proceeding that Mr. Taylor was not an officer under its "constitutional" test (R. 530a).[7] Therefore, Respondent raised the issue of compliance in the unfair practice proceeding itself so that upon the petition for judicial enforcement of the Board's order it could be sure of a fair opportunity to challenge the Board's definition of "officers."

[7] The Respondent well knew before the hearing of the unfair labor practice charge in this case that the Board would decide the question of the compliance status of the union against it in a collateral proceeding. The Respondent had urged in an earlier representation proceeding between the Respondent and the same charging Union herein, Case No. 9-RC-1235, 96 N. L. R. B. No. 209, that the union was not in compliance. As the Trial Examiner notes in this case, the Board took the same view in regard to the failure of Mr. Taylor to file an affidavit in the representation proceeding as it does in this case (R. 518a).

The Court Below Correctly Determined That the Board Must Adopt a Functional Test in Interpreting the Term "Officer" in Section 9(h).

Respondent contends that the Board's definition of the term "officer" is arbitrary and wholly inadequate to serve the legislative policy underlying Section 9(h). Rather, it is submitted, the term "officer" should be held to include all persons whose duties, responsibilities, and influence in the union measure up to those of an officer as that term is ordinarily understood. Such a definition, which looks to the functions which executives of labor unions exercise rather than the labels by which their positions are designated, is consistent with the intention of Congress to avoid Communist domination of labor union leadership.

This Court has held in the *Highland Park* case that Congress in enacting Section 9(h) meant to "wholly eradicate and bar from leadership in the American labor movement, *at each and every level*, adherents to the Communist Party and believers in the unconstitutional overthrow of our Government." 341 U. S. at 325. (Emphasis added.) Certainly, then, Congress meant to require affidavits of all union executives whose positions of leadership and influence give them an important role in labor relations, regardless of whether those positions are called offices in the union constitution. Surely, compliance with Section 9(h) by the relatively few people who occupy positions listed as offices in the union constitutions would fall far short of reaching into each and every level of power and influence in the American labor movement.

It cannot be seriously argued that a Communist would not eagerly grasp the opportunity to be Regional Director of the C. I. O. Respondent's claim is that it could show, if permitted, that Mr. Taylor had a working control over every C. I. O. local union and affiliated international union which operates within the confines of the Commonwealth of Kentucky and elsewhere within Taylor's region; that every action or move of importance relating to these C. I. O. unions is cleared through Mr. Taylor's office; that Mr. Taylor's influence frequently reaches the collective bargaining table, and that his power and prestige among the C. I. O. members of Kentucky is impressive and undeniable. Obviously the opportunities for a Communist in this post of union leadership to create friction in labor relations and to obstruct interstate commerce are so great that the policy of eradicating opportunities for Communist domination would not achieve its goal if regional directors are not held to be officers who must file affidavits. If the Board's "constitutional" test is upheld, wily Communists will merely seek those positions of influence which are not denominated offices in the union constitution. The Board's "constitutional" test will become a shield behind which they may hide.

On the other hand, the "functional" test for determining who are "officers" (*supra*, p. 16), it is submitted, is a reasonable construction of the statute and can appropriately be applied in this case to hold Regional Director Taylor an officer under Section 9(h). Respondent believes that reasonable people would consider an executive to be an officer of a union if he exer-

cises wide executive powers influencing the conduct of many others in union affairs.[8] Since Congress understood the potentialities for perverting the labor movement if positions of power (whether or not labeled offices in the union constitution) in the unions fall into the hands of Communists,[9] it is submitted that Congress meant that the term "officers" should be taken in this same popular sense.[10] How else would Congress extirpate Communist leaders "at each and every level" of the American labor movement? It seems clear that

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[8]The Board takes the view that "officer" is ordinarily understood to mean one whose position is listed as such in the constitution of a union or in the corporate charter in the case of a business corporation (Petitioner's brief, p. 16). It may not be unusual to look to the corporation charter as defining the officers in deciding technical questions of corporation law. But this is not such a case. The best source for the most common meaning of the words as used in everyday parlance is a dictionary. Webster's Dictionary defines "office" broadly as: "Position of trust, ministration, or authority . . .; an executive position with a corporation, institution, etc." An officer is: "One who holds an office. . . ."

See also *Watters* v. *Bank of America*, 9 Cal. 2d 46, 69 P. 2d 839, 842 (1937), where the court held that the "ordinary and usual meaning" of the word "officer" was "an employee invested with a part of the executive authority and who has a position of trust or authority in the regular and continued employment of the corporation."

[9]See *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 387-389 (1950). In that case, which upheld the constitutionality of Section 9(h), Chief Justice Vinson discussed at length the Communist threat to the American labor movement which Congress saw and tried to prevent by passing Section 9(h).

[10]This Court noted in *N. L. R. B.* v. *Highland Park*, 341 U. S. at 321, 325, that if Congress had meant the language of Section 9(h) to have other than its ordinarily accepted meaning, it would have provided special definitions. Since Congress has not specially defined "officers," it must have intended, therefore, that the term be used in its ordinary sense.

a broad, popular definition of "officers" is here required in carrying out a strong legislative policy."[1]

Finally, it may be noted that the Board urges that its construction of Section 9(h) should be given great weight since it is the agency to which is entrusted the administration of the statute (Petitioner's brief, p. 17). But actually the Board has vacated and abandoned in considerable measure that responsibility which the Board claims for itself, for making a workable definition of the term "officer." It has in fact transferred that duty to the labor organizations. The union may define its officers as it likes by calling or

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[1] The courts, in construing statutes so as to carry out the underlying legislative purpose have held holders of executive posts to be officers regardless of whether their positions are labelled as offices in the constitution, charter, or by-laws of an organization. In *Colby v. Klune*, 178 F. 2d 872, 873 (2d Cir., 1949), where, in defining the term "officers" for the purpose of Section 16(b) of the Securities Exchange Act of 1934, restricting "insider" profit-taking in corporate stock transactions, the court said:

> "It includes, *inter alia*, a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions. It is immaterial how his functions are labelled or how defined in the by-laws, or that he does or does not act under the supervision of some other corporate representative."

In *E. Clemons Horst Co.* v. *Industrial Accident Commission*, 184 Cal. 189, 193 Pac. 105 (1920), it was held that the superintendent of a plant was an officer within the meaning of the workmen's compensation law providing for increasing the amount of recovery when an employee was injured by reason of the wilful misconduct of an officer of the corporation, and *In re St. Lawrence & A. R. Co.*, 133 N. Y. 270, 31 N. E. 218 (1892), held that an attorney appointed by the railroad to certify petitions and pleadings for the institution of condemnation proceedings was an "officer" of the corporation within the statute requiring the petition in condemnation proceedings to be verified by an officer of the corporation.

not calling an executive position an office in the union constitution. It seems an extraordinary request to ask the courts to defer to a construction of the statute which is ultimately controlled by the very unions which it was the purpose of Congress to regulate.

CONCLUSION.

Respondent believes that the statement of the Congressional purpose in enacting Section 9(h) found in the *Highland Park* case (*supra*, p. 16) furnishes an adequate guide for the definition of "officers," and that the Court below properly rejected the Board's "constitutional" test as too narrow. Therefore, it is respectfully submitted that there is no need for this Court to review this case to determine the proper definition.

It is respectfully submitted that for the foregoing reasons the petition for writ of certiorari should be denied.

JOHN K. SKAGGS, JR.,
JAMES E. FAHEY,
Counsel for Respondent.

APPENDIX A—COURT OF APPEALS ORDER

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Docket No. 12,316
Order February 15, 1955

National Labor Relations Board, Petitioner

v.

Coca-Cola Bottling Company of Louisville, Inc., Respondent

Before Allen, Martin and McAllister, Circuit Judges.

This case came on to be heard upon the record and briefs and oral argument of counsel:

And it appearing that respondent at the hearing herein contended that W. B. Taylor, CIO Regional Director for Kentucky, is an officer of the CIO and is required under Section 9(h) of the Labor Management Relations Act, 29 U. S. C. 159(h), to file a non-Communist affidavit:

And it being conceded that said W. B. Taylor had not filed such an affidavit;

And it appearing that in support of its contention respondent offered to show that said W. B. Taylor is an officer of the CIO, that he exercises administrative and executive powers over United Brewery and Soft Drink Workers Local 20, and exercises a working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region;

And it appearing that the Trial Examiner excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceedings, in which action the Trial Examiner was sustained by the Board;

And it appearing that respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9(h); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325, 326;

The case is hereby remanded with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to this court.

Approved for entry:

(s) Florence E. Allen,
United States Circuit Judge.

APPENDIX B—RULE INVOLVED

Section 102.13 (b) of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 Fed. Reg. 1934, 1938, provides:

> Sec. 102.13. . . .
>
> (b) for the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:
>
> (1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.
>
> (2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.
>
> (3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the